SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 344

PUGET SOUND POWER & LIGHT COMPANY,
APPELLANT,

vs.

THE CITY OF SEATTLE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from superior court of King County	1	1
Amended complaint	1	1
Exhibit "A"—Ordinance providing for a license or occupation tax	21	18
Exhibit "B"—Application for license under protest	31	27
Motion to strike from amended complaint	36	31
Order on motion to strike	38	33
Demurrer to amended complaint	40	34
Order sustaining demurrer	41	34
Stipulation as to enforcement pending final determination	43	36
Judgment	45	37
Order allowing appeal	46	37
Proceedings in supreme court of Washington	47	38
Opinion, Blake, J.	47	38
Dissenting opinion, Steinert, J.	54	45
Opinion, Blake, J., case of Pacific T. & T. Co. vs. City of Seattle	58	48
Dissenting opinion, Steinert, J., case of Pacific T. & T. Co. vs. City of Seattle	66	56

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1933

	Original	Print
Petition for rehearing.....(omitted in printing)...	74	
Order denying rehearing.....	88	62
Judgment	89	63
Petition for appeal, assignments of error, and prayer for reversal	90	63
Order allowing appeal.....	105	67
Supersedeas bond on appeal.....(omitted in printing)..	107	
Citation and service.....(omitted in printing)..	109	
Præcipe for transcript of record.....	112	68
Clerk's certificate.....(omitted in printing)..	114	
Statement of points to be relied upon and designation as to record	115	69

[fols. a & 1]

IN SUPERIOR COURT OF KING COUNTY

No. 255,140

PUGET SOUND POWER & LIGHT COMPANY, a Corporation,
Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, Defendant

AMENDED COMPLAINT—Filed Sept. 19, 1932

Comes now the plaintiff and with permission of the court files its amended complaint, and for its first cause of action against defendant alleges:

I

That at all times herein mentioned since 1912, plaintiff has been and now is a public utility corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, and as such was and is duly authorized to engage in its business in the State of Washington; that plaintiff has had and has its main office and principal place of business in the City of Seattle, King County, Washington; that plaintiff as such corporation has been and is now engaged in the business of selling and furnishing electric light and power to the public for hire in the City of Seattle and State of Washington and by its corporate charter is empowered and authorized to engage in such business; that plaintiff has paid its last annual license fee and all other fees required to be paid by plaintiff under the laws of the State of Washington.

II

That defendant The City of Seattle is a municipal corporation, organized and existing as a city of the first class, [fol. 2] under and by virtue of the laws of the State of Washington, and a special charter which was adopted by defendant pursuant to such laws at the general election held March 3, 1896, and amended at general elections during succeeding years; that as such municipal corporation

at all times herein mentioned defendant, in a proprietary capacity, has been and now is engaged in the business of selling and furnishing electric light and power to the public for hire within the corporate limits of the City of Seattle, and has been and now is engaged in direct and active competition with plaintiff in such business.

III

That under the laws of the State of Washington defendant, The City of Seattle, has sole and exclusive power to fix and determine the rates at which it will sell electric light and power to its customers, and the rules, regulations and practices which it desires to follow in its said proprietary business of selling said electric light and power to the public; that with respect to its rates, rules, regulations and practices, defendant is not in any respect regulated by the State of Washington or its Department of Public Works; that under the laws of the State of Washington the property of defendant, used by it in its electric light and power utility business, is exempt from property taxes for city, county and state purposes; and that defendant is not required to pay and does not pay any such taxes.

IV

That plaintiff under the laws of the State of Washington Remington's Compiled Statutes, #10362, is subject to the exclusive jurisdiction and regulation of the Department of Public Works of the State of Washington as to the rates which plaintiff may charge its electric light and power customers and as to the rules, regulations and practices to be followed by it in the conduct of its said business; that with [fol. 3] respect to plaintiff's rates, rules, regulations and practices defendant has no lawful power of supervision, control or regulation; that under the laws of the State of Washington plaintiff is required to pay and does pay annual taxes for state, county and city purposes upon all of its property (including its franchise hereinafter described, granted by defendant) used in its said business in the amount of many thousands of dollars.

V

That the number of customers in the City of Seattle to whom electric light and power may be sold and the amount

thereof to be purchased is limited by the population of the City of Seattle and the needs of its inhabitants for electric light and power service, which customers may secure electric light and power only from plaintiff or defendant; that defendant at all times herein mentioned has been and is actively engaged in soliciting customers in the City of Seattle to whom it may sell electric light and power and is and has been actively soliciting customers of plaintiff to cease purchasing electric light and power from plaintiff and to make such purchases from defendant; that by reason thereof plaintiff, in order to retain its customers, is obliged to sell its electrical energy, light and power at a rate no higher than the rate fixed and determined by defendant as the rate to be charged defendant's customers.

VI

That defendant for hire in its proprietary capacity annually sells to defendant in its governmental capacity all of the electric light and power used by defendant for lighting its public streets and other municipal purposes; that the price paid by defendant to itself for such electrical energy is arbitrarily fixed and determined by defendant regardless of the market value of same and regardless of the price at which defendant could secure same in the open market; that to pay itself for such electrical energy money, in the amount thus determined by defendant as the price to [fol. 4] be paid for same, is transferred by defendant from its General Fund to its City Light Fund, which is the fund of defendant into which is paid all gross revenues received by defendant from its proprietary business of selling electric light and power to the public for hire; that the gross revenues of defendant's said proprietary business are annually increased in the amount of several hundred thousand dollars by such payments from defendant's General Fund, the amount of such increase for the year 1932 being in excess of the sum of $438,750.

VII

That plaintiff is the lawful owner and holder of a franchise known as the "Shuffleton Franchise", which was granted by defendant, The City of Seattle, by an ordinance known as Ordinance No. 7894 entitled:

"An Ordinance granting to S. L. Shuffleton, his successor and assigns, the right, privilege and franchise to construct, maintain and operate equipment and utilities for an Underground Electrical System, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle,"

passed by the City Council March 12, 1902, approved by the Mayor of said city on March 14, 1902, and accepted by the grantee March 27, 1902, Comptroller's File No. 245.

That said franchise inter alia grants to plaintiff for a period of fifty years, expiring March 14, 1952, "the right, authority and franchise on the conditions and for the considerations in this ordinance expressed, to construct, maintain and operate equipment and apparatus for an underground electric system, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle. This right, authority and franchise is intended to apply to all streets, [fol. 5] alleys and public places of said city, now or hereafter existing, subject to the terms and conditions hereinafter expressed; and said grantee, his successor and assigns, by accepting this ordinance, covenant that within three years from the approval of this ordinance he or they will have in operation a system extending to all streets and parts of streets now lighted by electricity;" that said grant is, by the terms of said franchise, subject to repeal or modification only "if the franchise granted hereby is not operated in accordance with the provisions of this ordinance, or at all."

That relying upon said franchise, plaintiff and/or its predecessor in interest, in the City of Seattle has constructed and acquired power plants and extensive distribution facilities for the purpose of selling and furnishing electric energy, light and power to the public, and continuously since the grant of said franchise by defendant has maintained and operated and is now maintaining and operating said plants and facilities and/or "said franchise" for such purpose, as required by said ordinance.

That by reason of the facts herein alleged defendant has granted plaintiff full authority and a license to engage in

its business of furnishing and selling electric light and power for hire within the corporate limits of the City of Seattle until March 14, 1952; that defendant may not now impair or burden such grant and/or such authority by requiring the plaintiff to secure from defendant the additional license to engage in such business, which defendant by its ordinance hereinafter set forth is asserting the right to require plaintiff t secure.

VIII

That defendant began its venture in the business of selling electric light and power to the public for hire on January 31, 1902, when its City Council passed an ordinance known as Ordinance No. 7708 entitled:

[fol. 6] "An Ordinance specifying and adopting the plan proposed by the City of Seattle for the acquiring for the city by purchase or construction, or both, a plant and system for furnishing light or power, or both, for corporate or individual uses, or both such uses, declaring the estimated cost thereof as near as may be, authorizing an indebtedness therefor, and submitting the same for ratification or rejection to the qualified voters of said city at the general election to be held on March 4, 1902,"

passed by the City Council on January 31, 1902, and approved by the Mayor on January 31, 1902; said ordinance was ratified at the general election held on March 4, 1902; that in said ordinance provision was made for an issue of general lien bonds in the amount of $590,000.00, the proceeds from the sale of which were to be used in the purchase or construction of a plant or system for furnishing light and power to the public for hire; that thereafter from time to time other general lien bonds for extensions to the electric lighting and power facilities of the defendant were authorized and issued; that of such general lien bonds there are now and on December 31, 1931, were outstanding bonds in the total principal amount of $1,447,000, approximately.

IX

That in addition to such general lien bonds defendant has financed the acquisition, construction and development of its electric lighting and power system by the issuance of

revenue bonds, the first of which were authorized and issued in the year 1917; that the total principal amount of such revenue bonds which are now and on December 31, 1931, were outstanding, is approximately $32,852,000; that such revenue bonds have all been authorized and issued by ordinances enacted pursuant to the authority vested in defendant to do so by an act of the Legislature of the State of Washington which is Section 9491 of Remington's Compiled Statutes; that such revenue bonds are obligations against only the gross revenues received by the defendant from the sale of electric light and power to the public, [fol. 7] which gross revenues are by law and the provisions of each of said ordinances and by the terms and conditions of each of said bonds pledged to the payment of the principal of said bonds and any interest due thereon; that such pledge constitutes a charge upon such gross revenues "prior and superior to all other charges whatsoever, including charges for maintenance and operation."

X

That under Article VIII, Section 9, of the Charter of the City of Seattle, as amended March 4, 1913, all revenues due to the City of Seattle for electric light and power sold by it must be collected by the City Treasurer, who is required to keep said revenues in a separate fund, designated City Light Fund; that by virtue of Article IX, Section 17, of said Charter "no transfer shall be made from one fund to another except as otherwise provided in this charter, unless by an affirmative vote of a majority of the members elected of the City Council by ayes and noes recorded in the journal of proceedings;" that there is no other provision in said charter providing for the transfer of money from the Department of Lighting fund to the General Fund of the City of Seattle; that under Article IX section 6, of the Charter of the City of Seattle, it is required of the City Treasurer that "he shall not pay out any moneys belonging to the city except upon legal demands allowed and audited in the manner prescribed by this charter or by law"; that under Article IX, Section 7, of said Charter, the duties of the City Treasurer are specified as follows:

"It shall be the duty of the City Treasurer to receipt for the moneys of the city and to pay out the same only on warrants drawn in pursuance of the order of the City

Council and signed and registered by the City Comptroller."

XI

That pursuant to the law of the State of Washington, [fol. 8] Remington's Compiled Statutes, #9000, defendant, on October 5, 1931 adopted its budget of expenses and revenues for the year 1932; that under said law "each and every city official and employe" in making expenditures and in the incurring of liabilities, is limited "to the amounts of such detailed budget"; that in said budget no provision is made for payment of any license fee or tax by defendant out of the revenues of its Department of Lighting or other revenues; that under said law of the State of Washington and said budget no such payment may lawfully be made by defendant for or during the year 1932; that a copy of said budget is attached hereto, and by this reference made a part hereof.

XII

That on the 23rd day of May, 1932, the City Council of defendant the City of Seattle, in the exercise of a claimed governmental power and authority to do so, passed an ordinance known as Ordinance No. 62662 and/or No. 62662 as amended, which was approved by the acting mayor of said city on May 25, 1932, was on said date filed by the City Comptroller and ex-officio City Clerk, and on May 31, 1932, was duly published, which ordinance is entitled:

"An Ordinance relating to and providing for a license or occupation tax upon certain businesses, occupations, pursuits, and privileges; defining offenses and providing penalties."

That the terms and provisions of said ordinance, so far as same are pertinent to plaintiff's cause of action, are attached hereto, marked Exhibit "A" and by this reference made a part hereof; that defendant claims and asserts that said ordinance is in all respects a valid law and ordinance of the City of Seattle and that plaintiff is legally and validly thereby required to apply for the license, to file the return of its "gross income", and to pay the license fee or tax as provided in said ordinance, and that in default thereof plaintiff will be subject to the penalties therein specified.

[fol. 9] XIII

That to avoid the risk of the penalties provided in said ordinance No. 62662 and/or 62662 as amended, and to enable plaintiff in an orderly manner to lawfully contest the validity of said ordinance and the right of defendant by said ordinance to extract from plaintiff the license fee or tax therein provided, plaintiff, on July 1, 1932, all under written protest, a copy of which is attached and marked Exhibit "B", applied for the license, and although uncertain as to the meaning of "gross income", as same is defined in Section 2 of said ordinance and unable to determine the manner by which such gross income as defined could be ascertained, nevertheless made a return showing its "gross income" as required by said ordinance, and paid to defendant in cash the sum of $9,697.75, in payment of the first monthly installment of the license fee or tax that would be due to defendant if said ordinance were valid and enforceable as to plaintiff with respect to its electric light and power business; that plaintiff contending that said ordinance is invalid and unenforceable as to plaintiff, brings this action for the purpose of recovering from defendant the said money paid to defendant, under protest, as herein alleged.

XIV

That by said ordinance No. 62662 and/or No. 62662 as amended, defendant is not required to pay the license fee or tax therein specified out of revenues received by defendant from the sale of electrical energy which in its proprietary capacity in competition with plaintiff defendant furnishes and sells to the public for hire; nor is defendant by said ordinance required to pay such license fee or tax at all; and that said ordinance is in no respect enforceable against defendant and in no respect imposes said license fee or tax upon defendant.

[fol. 10] XV

That in truth and in fact defendant has not paid the license fee or tax specified in said ordinance or any part thereof; and upon information and belief, based upon the form in which said ordinance was enacted as hereinbefore alleged and the failure of defendant to pay said license fee

or tax, plaintiff alleges that defendant does not intend to pay and will not pay said license fee or tax or any part thereof.

XVI

That regardless of the good or bad faith of defendant in the enactment of said ordinance, regardless of defendant's assertion of a willingness to cause money received by it from the sale of electrical energy for hire to be transferred to its General Fund and regardless of any assertion by defendant of its intention to make such a transfer, even though the said ordinance does not require defendant so to do, plaintiff asserts that under the facts as herein alleged defendant by the enactment of said ordinance is in truth and in fact unlawfully exercising its governmental power of taxation in aid of its proprietary business of selling and furnishing electrical energy to the public for hire; that under the facts herein alleged the exercise of such governmental power of taxation by defendant against plaintiff, its competitor, as defendant by said ordinance is asserting the right to exercise same, will enable defendant as prosecutor, jury, judge and executioner to annihilate plaintiff's business to the benefit of defendant's proprietary competing business; that to permit defendant by the exercise of such governmental power of taxation to extract such a portion of plaintiff's gross income as defendant, may designate, and/or as defendant in said ordinance has designated, which gross income is definitely limited by defendant's competition with plaintiff, as herein alleged, will deprive plaintiff of its property without due process of law, and will deny plaintiff equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Sec- [fol. 11] tion 16, of the Constitution of the State of Washington, and will constitute a taking of plaintiff's property for a public purpose without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States; that as to plaintiff any exercise of such power by defendant is and can only be unjust, unfair, unreasonable, inequitable and discriminatory; that defendant by reason of its competition with plaintiff and the facts herein alleged, is as to plaintiff estopped from any such exercise of such governmental power of taxation.

XVII

That the State of Washington by virtue of Chapter 227 of its Laws of 1929 has required plaintiff to secure and that plaintiff has secured and now has, and since July 1, 1932, has had from the State of Washington, a license by which plaintiff is authorized to engage in its business of selling and furnishing electric light and power for hire in the State of Washington, which license by its terms and the terms of said statute is paid for by defendant and is issued by the State of Washington "for the privilege of doing" its intrastate business in the entire State of Washington, including the City of Seattle.

XVIII

That the State of Washington by virtue of Chapter 107 and Chapter 227 of its Laws of 1929 annually collects from plaintiff, and plaintiff since the enactment thereof has annually paid to the State of Washington one-tenth of one per cent of the gross operating revenue received by plaintiff from its business of selling and furnishing electric light and power in the State of Washington, including the City of Seattle; that the total amount of such tax and annual license fee paid to the State of Washington by plaintiff for the current calendar year was $12,871.40.

[fol. 12]

XIX

That by the enactment and enforcement of Chapters 107 and 227 of its Laws of 1929, as alleged in paragraphs XVII and XVIII hereof, the State of Washington has occupied the field of levying an excise tax upon the business of plaintiff and or of levying a license tax upon plaintiff for revenue purposes, and has thereby excluded defendant from said field of excise taxation, and has thereby taken from defendant all power and authority, if any it had prior thereto, to exact of plaintiff a license fee for revenue purposes and or an occupation tax.

XX

That continuously since July 1, 1932, the rates charged by defendant and the rates now charged by it for the electric light and power which it sells to the public for hire are in no respect greater than were the rates charged

by defendant for same prior to July 1, 1932, and prior to the enactment of said ordinance No. 62662 and/or No. 62662 as amended.

XXI

That as to plaintiff said ordinance No. 62662 and/or No. 62662 as amended is invalid, unlawful and unenforceable for the following reasons:

(1) Under the laws of the State of Washington defendant has no power or authority to enact and/or to enforce said ordinance and/or to impose upon plaintiff the license fee or tax provided therein.

(2) Under the laws of the State of Washington defendant has no power or authority to impose an occupation tax upon plaintiff.

(3) By reason of the direct and active competition existing between plaintiff and defendant as herein alleged, defendant may not lawfully extract from plaintiff the amount of the license fee and/or tax provided in the ordinance.

(4) The ordinance and the enforcement thereof as to plaintiff would deprive plaintiff of its property and prop- [fol. 13] erty rights without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(5) The ordinance and the enforcement thereof as to plaintiff would take plaintiff's private property for a public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 16, of the Constitution of the State of Washington.

(6) The ordinance and the enforcement thereof as to plaintiff would deny plaintiff equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(7) The ordinance and the enforcement thereof as to plaintiff would impair the obligation of the franchise granted to plaintiff by defendant and would impose upon plaintiff additional and unjust obligations which violate the

terms of its franchise, in contravention of Article I, Section 10 of the Constitution of the United States.

(8) The ordinance and the enforcement of its terms as to plaintiff would take from plaintiff property rights and privileges lawfully vested in plaintiff under the franchise granted by defendant, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(9) The State of Washington by the enactment of Chapter 227 of its Laws of 1929, requiring a foreign corporation to pay an annual license fee "for the privilege of doing business" in the State of Washington (which fee plaintiff has paid and is now paying) and by the enactment of Chapter 107 of its Laws of 1929 and Chapter 107 of its Laws of 1923 requiring each public utility corporation engaged in business in the State of Washington to pay a fee of one-tenth of one per cent of its gross operating revenue from [fol. 14] intrastate transactions into the public service revolving fund of the State of Washington (which fee plaintiff has paid and is now paying), has entered upon the field of levying an excise tax upon the "carrying on" of the business of plaintiff; that by reason thereof defendant is precluded from extracting the license fee or tax provided in said ordinance from plaintiff.

(10) The ordinance violates Chapter 227 of the Laws of 1929 of the State of Washington, pursuant to which plaintiff is licensed to engage in the business of selling and furnishing electric light and power in and throughout the State of Washington, including the City of Seattle.

(11) The ordinance conflicts with and contravenes Chapter 107 of the Laws of 1929 of the State of Washington, pursuant to which plaintiff has paid and pays a fee of one-tenth of one per cent of its gross operating revenue into the public service revolving fund of the State of Washington.

(12) The ordinance unlawfully discriminates against plaintiff and in favor of defendant in that: (a) it does not require payment of said license fee or tax by the defendant out of revenues received by it from the sale of electric light and power; (b) it provides no valid or other method whereby the fee or tax ostensibly imposed upon defendant

by said ordinance can be enforced, paid or collected, and to that extent is ineffective and wholly null and void; (c) the prior pledge of the gross revenues received by defendant from the sale of electric light and power to the payment of the revenue bonds of the city deprives defendant of any lawful right to divert from such gross revenues the amount of money necessary to enable defendant to pay the fee or tax which the ordinance ostensibly requires it to pay; (d) under the Seattle budget for 1932 any attempt by any officer or employe of defendant to pay said tax for the year 1932 out of the revenue of its lighting department would be in violation of the law of the State of Washington; and (e) while the ordinance and the enforcement thereof as to plain-[fol. 15] tiff would require actual payment by plaintiff of the fee or tax provided therein, defendant, as to its similar competing utility business, owned and operated in its proprietary capacity, is in fact and in law and by the terms of said ordinance exempt from payment of said fee or tax; that by reason thereof said ordinance and such classification is discriminatory, arbitrary, unreasonable, unreal, unfair and unlawful, and in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(13) The enactment of said ordinance constitutes an illegal attempt by defendant to regulate rates, charges, business and operations of plaintiff, in violation of the laws of the State of Washington delegating such authority solely and exclusively to the Department of Public Works of the State of Washington, and is an illegal attempt by the City of Seattle to usurp the functions and powers of said State Department.

(14) That in its operation and effect said ordinance if enforced as to plaintiff, will enable defendant to annihilate plaintiff's business and will deprive plaintiff of its property without due process of law, and will constitute unlawful, unfair, unjust, unreasonable and confiscatory competition, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington, and will constitute an unlawful taking of plaintiff's property by the exercise of a governmental power without just compensa-

tion, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 16, of the Constitution of the State of Washington.

(15) Defendant has no power to compel plaintiff under penalty of fine and/or imprisonment, or both, as provided in said ordinance to make a return of its gross income [fol. 16] and/or to pay said license fee or tax and/or to apply for and obtain a new and additional license to carry on its business as a condition precedent (a) to the exercise of the precise rights and privileges granted plaintiff in its franchise from defendant and/or (b) as a condition precedent to plaintiff's lawfully rendering the service which as a public utility company it is legally licensed to render by the State of Washington and is legally required to render to the public whether the license specified in said ordinance is granted or withheld by defendant.

(16) The penalties provided in said ordinance are excessive, oppressive, unusual and confiscatory and as such are in contravention of the Eighth Amendment to the Constitution of the United States and Article I, Section 14, of the Constitution of the State of Washington, and in excess of any penalty which the City of Seattle has power to impose.

(17) The ordinance, if enforced as to plaintiff would operate to require plaintiff to secure the license and to extract from plaintiff the fee or tax provided therein, not only under the penalty provided in the ordinance but also, as provided in the prior franchise granted to plaintiff by defendant, under the further penalty of having said franchise become subject to repeal by defendant if plaintiff fails to operate its electric light and power system in the City of Seattle and/or fails to operate said franchise, and would unlawfully add an additional burden to said franchise, and would thereby impair the obligation of said franchise, in contravention of Article I, Section 10, of the Constitution of the United States, and would deprive plaintiff of its property without due process of law, in violation of the due process clauses of the Constitutions of the United States and the State of Washington.

(18) The license fee or tax provided by said ordinance is not levied in pursuance of law as required by Article VII, Section 5, of the Constitution of the State of Washington.

[fol. 17] (19) The license fee or tax provided by said ordinance is not uniform in respect to persons and property within the jurisdiction of the City of Seattle as required by Article VII, Section 9, of the Constitution of the State of Washington.

(20) The method of appeal and review provided in said ordinance is indefinite, inadequate, unfair and unlawful in that in denies to plaintiff the right to a fair and impartial review of the determination of the City Council of the City of Seattle as to the amount of the fee or tax plaintiff may be required to pay, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington.

(21) The ordinance, and particularly Section 2 thereof in which the term "gross income" is defined, is vague, indefinite and uncertain with respect to the amount of the tax to be paid and the manner by which the amount may be ascertained, to an extent that the taxpayer may not without litigation determine the amoun of the tax he would owe, and is therefore invalid and unenforceable, even though the ordinance were not otherwise invalid.

XXII

That by reason of the above and foregoing allegations said ordinance as to plaintiff is invalid, void and unenforceable; that defendant is not lawfully entitled to retain the money paid under protest by plaintiff to defendant as alleged in paragraph XIII hereof, and that plaintiff is lawfully entitled to recover said money in the amount of $9,697.75 from defendant, together with interest thereon from the first day of July, 1932, until paid.

Wherefore, under its first cause of action plaintiff prays judgment against the defendant in the sum of $9,697.75, together with interest thereon at the rate of six per cent per annum from July 1, 1932, until paid, and for its costs and disbursements herein to be taxed.

For its second cause of action against defendant, plaintiff alleges:

[fol. 18] I

Plaintiff incorporates in this its second cause of action against defendant each and every allegation contained in

paragraphs I to XXII (both inclusive) of its first cause of action (supra), the same in all respects as though each of said allegations contained in each of said paragraphs numbered I to XXII, respectively, were specifically set forth herein.

II

That defendant unlawfully claims and asserts that under said ordinance plaintiff is required to pay to defendant, on or before the 10th day of August, 1932, an additional amount of $9,697.75, as the second monthly installment of the license fee or tax that would be due from plaintiff if said ordinance were valid and enforceable as to plaintiff, and that plaintiff is required to pay a like amount on or before the 10th day of each succeeding month during the balance of the license tax year specified in said ordinance; and that upon failure to make such payments plaintiff will be subject to the penalties specified in the ordinance which defendant threatens it will endeavor to enforce against plaintiff.

III

That the general fund of defendant is now heavily overdrawn in the amount of approximately $2,000,000, and that the banks in the City of Seattle have since May, 1932, refused to cash or accept any and all warrants on said fund; that warrants drawn on said fund cannot be cashed; that if plaintiff continues to pay said monthly installments of said license fee or tax, and the said ordinance is declared to be void, invalid and unconstitutional as contended by plaintiff, the time of repayment thereof to plaintiff by defendant is wholly conjectural and uncertain.

IV

That should plaintiff pay such illegal fees or taxes pursuant to the terms of said ordinance, and be compelled to [fol. 19] resort to suit to recover same from defendant, plaintiff's remedy would be neither timely, adequate nor complete; that plaintiff would be thereby caused to suffer an irreparable injury, and be thereby compelled to resort to a multiplicity of suits and prolonged litigation in order to obtain any relief from such unlawful taxation.

V

That should plaintiff refuse to make payment of said monthly installments of such license fee or tax, plaintiff will be subject (1) to heavy, unlawful, oppressive and confiscatory penalties in addition to such license fee or tax, which penalties are in themselves violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States, penalties which are of such a nature that the threat of same entitles plaintiff to injunctive relief; (2) to being deprived of the right to exercise the corporate powers granted plaintiff by the State of Massachusetts and the license granted plaintiff by the State of Washington, and the franchises granted plaintiff by defendant; (3) to being unlawfully deprived of its lawful right to continue in business as a public utility company in the City of Seattle; and (4) to being denied the opportunity to perform its lawful duty as a public utility company, which is required by the laws of the State of Washington and by the common law to continuously serve the public.

VI

That plaintiff is ready, able and willing to pay such license fee or tax, if any, as may be lawfully due or owing by plaintiff to defendant.

VII

That by reason of said facts as herein alleged plaintiff has no adequate remedy except in a court of equity, and unless equitable relief by injunction, temporary and permanent, is granted by this court, plaintiff will be deprived of its lawful rights as herein alleged.

[fol. 20] Wherefore, under its second cause of action plaintiff prays a judgment and decree of this court as follows:

(1) That defendant, its officers, agents and employes be forever enjoined and restrained from enforcing as against plaintiff the said ordinance No. 62662 and/or No. 62662 as amended, or any portion thereof.

(2) That pending the determination of this suit defendant, its officers, agents and employes be temporarily enjoined and restrained from enforcing as against this plaintiff the said ordinance No. 62662 and/or No. 62662 as amended, or any portion thereof, and that defendant be required to show cause on a day certain to be fixed by this Court why such temporary injunction should not be granted as herein prayed.

(3) That plaintiff do have and recover its costs and disbursements herein.

(4) That plaintiff have such other and further relief as to the court may seem just and proper.

Todd, Holman and Sprague and Clarence Innis,
Attorneys for Plaintiff.

[fol. 21] EXHIBIT "A" TO AMENDED COMPLAINT

Ordinance No. 62662

An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties

Be it ordained by the City of Seattle as follows:

Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. Definitions: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied;

Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes,

bonds, mortgages, or other evidences of indebtedness or stocks and the life) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Person or Persons: Persons of either sex, firms, copartnerships, corporations and other associations of natural persons, whether acting by themselves or by servants, agents or employes.

Taxpayer: Any person liable to the license fee or tax imposed by this ordinance.

[fol. 22] Tax Year or Taxable Year: The year commencing March 1st and ending on the last day of February of the following year, or, in lieu thereof the taxpayer's fiscal year when permission is obtained from the City Comptroller to use the same as the tax period.

Section 3. "Occupation License" Required: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an "Occupation License."

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his "Occupation License" so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 4. License Tax Year: All "Occupation Licenses" shall be for the tax year for which issued and shall expire at the end of such tax year.

Such "Occupation License" and the fee or tax therefor hereby imposed shall be for the year commencing March 1st and ending on the last day of February of the following year; Provided, however, that if the taxpayer in transacting his business keeps the books reflecting the same for a

fiscal year not based on the calendar year, he may, with the assent of the City Comptroller, obtain his license for the period of his current fiscal year which shall be deemed his tax year, and pay the fee or tax computed upon his [fol. 23] gross income made during his fiscal year (next preceding his tax year) covering his accounting period as shown by the method of keeping the books of the business.

Section 5. Occupations Subject to Tax—Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rate against gross income, as follows:

(a) * * *

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

(d) Upon every person conducting or engaged in the business of supplying steam heat or power to the public for hire a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Fifty ($50.00) Dollars per tax year.

(e) * * *

Section 6. City of Seattle, Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be

applicable to the City of Seattle, except that said City shall [fol. 24] not as a taxpayer, be required to conform to the other provisions of this ordinance.

Section 7. * * *

Section 8. Tax Apportioned for Year 1932: For the remainder of the tax year 1932, ending on the last day of February, 1933, the fees or taxes herein imposed shall be apportioned in the ratio of said remainder to a full tax year.

Section 9. Exceptions and Deductions: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services.

Nothing in this ordinance shall be construed as requiring a license or the payment of a license fee or tax, or the doing of any act, which would constitute an unlawful burden or interference in violation of the Constitution or laws of the United States, or which would not be consistent with the Constitution or laws of the State of Washington.

Any person subject to the payment of a license fee or tax under the provisions of any ordinance of the City, other than this, on account of engaging in any activity for which he is liable to tax hereunder, may deduct the amount of such fee or tax from the amount of fee or tax imposed by this ordinance on account of such activity, but such person shall nevertheless in the manner herein provided for, apply for and procure an "Occupation License."

Section 10. Application or Return for License: On or before the 1st day of July, 1932, and thereafter on or before the first day of each tax year, every taxpayer shall apply to the City Comptroller for an "Occupation License" upon [fol. 25] blanks or forms of return to be prepared and provided by him requesting such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax. The taxpayer shall, in a legible manner write in such blank or form of return the information required and

shall sign the same and by affidavit at the foot thereof shall swear or affirm that the information therein given is full and true and that he knows the same to be so.

Every such application or return shall be accompanied by a remittance by bank draft, certified check, cashier's check or money order, payable to the City Treasurer, or in cash, in the amount of the tax or fee or installment thereof required by the provisions hereof.

If the applicant be a partnership, the application or return must be made by one of the partners; if a corporation, by one of the officers thereof; if a foreign corporation, co-partnership or non-resident individual by the resident agent or local manager of said corporation, co-partnership or individual.

Section 11. Monthly and Quarterly Payment of Tax: Where the amount of the license fee or tax is based upon gross income the taxpayer may pay his fee or tax in equal monthly installments during the life of his license, each such installment to be paid on or before the 10th day of the month. In all other cases the taxpayer may pay his fee or tax in equal installments during the life of his license, each such installment to be paid on or before the 1st day of March, the 1st day of June, the 1st day of September and the 1st day of December respectively.

Section 12. When Tax Based on Current Year—Commencement of Business During Tax Year: Where a business, occupation or pursuit subject to tax upon gross income has not been carried on for the full calendar or fiscal year next preceding the tax year for which license is required, the license fee or tax shall be paid monthly in installments during the life of the license on or before the 10th day of the month, and shall be based upon the gross [fol. 26] income for the month next preceding that in which payment is due. In such cases the taxpayer shall make monthly returns similar to the annual returns provided for herein on or before the 10th day of the month under oath or affirmation covering the business of the previous month.

In all other cases where a person commences during any tax year to engage in any business, occupation, pursuit or privilege he shall be entitled to a license for the remainder of such tax year for the required fee apportioned in the ratio of said remainder to a full tax year.

Section 13. Monthly Payments—License Prerequisite: In any case where the taxpayer pays his license fee or tax monthly he shall nevertheless first procure his "Occupation License" in the manner herein required before commencing or continuing in business, and shall pay the minimum fee or tax therefore, which shall be credited against future installments.

Section 14. Sale or transfer of Business: Upon the sale or transfer during any tax year of a business on account of which a fee or tax is hereby required, the purchaser or transferee shall, if the fee or tax has not been paid in full for said year, be responsible for its payment for that portion of said year during which he carries on such business.

Section 15. Taxpayer to Keep Books and Records—Returns Confidential: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller pursuant to this ordinance, shall not be made public nor shall they be subject to the inspection of any [fol. 27] person except the Mayor, the Corporation Counsel, the City Comptroller or his authorized agent, and members of the City Council.

Section 16. Comptroller to Investigate Returns: If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpœna to the taxpayer, or any other

person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpœna, require him, or any person, to being with him such books, records, and papers as may be necessary.

Section 17. Over or Underpayment of Tax: If the City Comptroller upon investigation or upon checking returns finds that the fee or tax paid or any of them is more than the amount required of the taxpayer, he shall refund the amount overpaid by a warrant upon the General Fund. If the City Comptroller finds that the fee or tax paid is less than required, he shall send a statement to the taxpayer showing the balance due, who shall within three (3) days pay the amount shown thereon.

Section 18. Remedy for Non-payment of Tax: If any taxpayer fails to apply for license or make his return, or to pay the fee or tax therefor or any part thereof, within three (3) days after the same shall have become due, the City Comptroller shall ascertain the amount of the fee or tax or installment thereof due and shall notify such tax-[fol. 28] payer thereof, who shall be liable therefor in any suit or action by the City for the collection thereof. The City Comptroller shall also notify the Corporation Counsel in writing of the name of such delinquent taxpayer and the amount due from him and said officer shall, with the assistance of the City Comptroller, collect the same by any appropriate means or by suit or action in the name of the City.

Section 19. Appeals to City Council: Any taxpayer aggrieved by the amount of the fee or tax found by the City Comptroller to be required under the provisions of this ordinance, may appeal to the City Council from such finding by filing a written notice of appeal with the City Clerk within five (5) days from the time such taxpayer was given notice of such amount. The Clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than ten (10) days after the filing of the notice of appeal, and he shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing, the taxpayer shall be entitled to be heard and to introduce evidence in his own behalf. The City Council shall thereupon ascertain the correct amount of the fee or tax by resolution and the City

Clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal, if appellant is unsuccessful therein, must be paid within three (3) days after such notice is given.

The President of the City Council, or the Chairman of any committee thereof before which the appeal is to be heard, may, by subpœna, require the attendance thereat of any person, and may also require him to produce any pertinent books and records. Any person served with such subpœna shall appear at the time and place therein stated and produce the books and records required, if any, and shall testify truthfully under oath administered by the Chair-[fol. 29] man in charge of the hearing on appeal as to any matter required of him pertinent to the appeal, and it shall be unlawful for him to fail or refuse so to do.

Section 20. Comptroller to Make Rules: The City Comptroller shall have the power, and it shall be his duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with, any such rule or regulation.

Section 21. Licenses—Posting—Unlawful Use of: All licenses issued pursuant to the provisions of this ordinance shall be kept posted by the licensee in a conspicuous place in his principal place of business in the City, except that all licenses for the operation of a vehicle shall be attached in a conspicuous place upon the right hand side of such vehicle in a suitable holder to be furnished by the City Comptroller upon the payment of a fee of Twenty-five ($.25) Cents.

No person to whom a license has been issued, pursuant to this ordinance, shall suffer or allow any other person chargeable with a separate license to operate under or display his license, nor shall such other person operate under or display such license.

Section 22. False Returns, etc.: It shall be unlawful for any person liable to tax hereunder to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make any false or fradulent application or return or any false statement or representation in, or in connection with, any such application or return, or to aid or abet another in any

attempt to evade payment of the fee or tax, or any part thereof, or for any person to fail to appear and/or testify in response to subpœna issued pursuant hereto, or to testify falsely upon any investigation of the correctness of a [fol. 30] return, or upon the hearing of any appeal, or in any manner to hinder or delay the City or any of its officers in carrying out the provisions of this ordinance.

Section 23. Effect of Partial Invalidity: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Section 24. Penalty: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 25. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council the 23rd day of May, 1932, and signed by me in open session in authentication of its passage this 23rd day of May, 1932.

James Scavotto, President pro Tem. of the City Council.

Approved by me this 25th day of May, 1932.

Philip Tindall, Acting Mayor.

Filed by me this 25th day of May, 1932.

Attest:

H. W. Carroll, City Comptroller and ex-Officio City Clerk, (Seal) by E. M. Street, Deputy Clerk. City Comptroller and ex-Officio City Clerk, by Deputy Clerk.

Published May 31, 1932.

[fol. 31] EXHIBIT "B" TO AMENDED COMPLAINT

To the City of Seattle, a municipal corporation; the Honorable City Council of the City of Seattle, Harry W. Carroll, Esq., Comptroller of the City of Seattle, and H. L. Collier, Esq., Treasurer of the City of Seattle:

Comes now Puget Sound Power & Light Company, a Massachusetts corporation, denying the validity of Ordinance No. 62662 and/or No. 62662 as amended of the City of Seattle and the authority of the City of Seattle to enact said ordinance and/or to require Puget Sound Power & Light Company to comply with all or any of the provisions thereof, and under protest, applies to the Comptroller of the City of Seattle for an "Occupation License" as required by Section 10 of said ordinance No. 62662 and/or No. 62662 as amended of the City of Seattle; under further protest files its return as provided thereby, and, under further protest pays herewith the sum of $9,697.75, as the first installment of the tax imposed by said ordinance under Section 5, Subdivision (c) thereof (Electric Light and Power).

The specific grounds upon which the Puget Sound Power & Light Company protests and objects are hereinafter set forth, and you are hereby notified that it will institute an appropriate suit or action to test the validity of said ordinance and the right of the city to require said return and license and to impose said tax, and also to recover said tax, with interest from date of payment.

The specific grounds upon which the Puget Sound Power & Light Company protests are as follows:

(1) Under the laws of the State of Washington the City of Seattle has no power or authority to enact and/or to enforce said ordinance and/or to impose upon protestant the license fee or tax provided therein.

(2) By reason of the direct and active competition existing between protestant and the City of Seattle in furnishing and selling electric light and power, the City of [fol. 32] Seattle may not lawfully extract from protestant the amount of the tax provided in the ordinance.

(3) The ordinance and the enforcement thereof as to protestant would deprive it of its property and property rights

without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(4) The ordinance and the enforcement thereof as to protestant would take its private property for a public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 16, of the Constitution of the State of Washington.

(5) The ordinance and the enforcement thereof as to protestant would deny protestant equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(6) The ordinance and the enforcement thereof as to protestant would impair the obligation of the Franchise granted to it by the City of Seattle and would impose upon protestant additional and unjust obligations which violate the terms of its franchise, in contravention of Article I, Section 10, of the Constitution of the United States.

(7) The ordinance and the enforcement of its terms as to protestant would take from protestant property rights and privileges lawfully vested in protestant under the franchise granted by the City of Seattle, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(8) The tax sought to be imposed by the ordinance as to protestant is discriminatory, unjust, unfair, and so unreasonably high that the imposition thereof upon protestant would result in a confiscation of its property, in contravention of the due process clause of the Fourteenth [fol. 32½] Amendment to the Constitution of the United States.

(9) The ordinance unlawfully discriminates against protestant and in favor of the City of Seattle in that: (a) it does not require payment of said license fee or tax by the City of Seattle out of revenues received by it from the sale of electric light and power; (b) it provides no valid or other method whereby the fee or tax ostensibly imposed

upon the City of Seattle by said ordinance can be enforced, paid or collected, and to that extent is ineffective and wholly null and void; (c) the prior pledge of the gross revenues received by the City of Seattle from the sale of electric light and power to the payment of the revenue bonds of the city deprives the City of Seattle of any lawful right to divert from such gross revenues the amount of money necessary to enable the city to pay the fee or tax which the ordinance ostensibly requires the city to pay; (d) under the Seattle budget for 1932 any attempt by any officer or employe of the City of Seattle to pay said tax for the year 1932 out of the revenues of its lighting department would be in violation of the law of the State of Washington; and (e) while the ordinance and the enforcement thereof as to protestant would require actual payment by it of the fee or tax provided therein, the City of Seattle as to its similar competing utility business owned and operated by the city in its proprietary capacity is in fact and in law and by the terms of said ordinance exempt from payment of said fee or tax; that such classification is discriminatory, arbitrary, unreasonable, unreal, unfair and unlawful, and in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(10) The enactment of said ordinance constitutes an illegal attempt by the City of Seattle to regulate rates, charges, business and operations of protestant, in violation of the laws of the State of Washington, delegating such au- [fol. 33] thority solely and exclusively to the Department of Public Works of the State of Washington, and is an illegal attempt by the City of Seattle to usurp the functions and powers of said State Department.

(11) The City of Seattle has no power to compel protestant under penalty of fine and/or imprisonment, or both, as provided in said ordinance to make a return of its gross income, to pay said license fee or tax and to apply for and obtain a new and additional license to carry on its business as a condition precedent (a) to the exercise of the precise rights and privileges granted protestant in its franchise from the City of Seattle, and/or (b) as a condition precedent to protestant's lawfully rendering the service which as a public utility company it is legally required to render

to the public whether the license specified in said ordinance is granted or withheld by the City of Seattle.

(12) The penalties provided in said ordinance are excessive, oppressive, unusual and confiscatory and as such are in contravention of the Eighth Amendment to the Constitution of the United States and Article I, Section 14, of the Constitution of the State of Washington, and in excess of any penalty which the City of Seattle has power to impose.

(13) The Ordinance, if enforced as to protestant, would operate to extract from protestant the fee or tax provided therein, not only under the penalty provided in the ordinance but also, as provided in the prior franchise granted to protestant by the City of Seattle under the further penalty of having said franchise become subject to repeal by the City of Seattle, if protestant fails to operate its electric light and power system in the City of Seattle and or fails to operate said franchise and would unlawfully add an additional burden to said franchise and would thereby impair the obligation of said franchise, in contravention of Article I, Section 10, of the Constitution of the United States, and would deprive protestant of its property without due process of law, in violation of the due process clauses [fol. 34] of the Constitutions of the United States and the State of Washington.

(14) The license fee or tax provided by said ordinance is not levied in pursuance of law as required by Article VII, Section 5, of the Constitution of the State of Washington.

(15) The license fee or tax provided by said ordinance is not uniform in respect to persons and property within the jurisdiction of the City of Seattle as required by Article VII, Section 9, of the Constitution of the State of Washington.

(16) The method of appeal and review provided in said ordinance is indefinite, inadequate, unfair and unlawful in that it denies to protestant the right to a fair and impartial review of the determination of the City Council of the City of Seattle as to the amount of the fee or tax protestant may be required to pay, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of

the United States and Article I, Section 3, of the Constitution of the State of Washington.

(17) The ordinance and particularly Section 2 thereof in which the term "gross income" is defined, is vague, indefinite and uncertain with respect to the amount of the tax to be paid and the manner by which the amount may be ascertained, to an extent that the taxpayer may not without litigation determine with any degree of certainty the amount of the tax he would owe, and is therefore invalid and unenforceable, even though the ordinance were not otherwise invalid.

Done this 1st day of July, 1932.

Puget Sound Power & Light Company, by Frank McLaughlin, President. Todd, Holman & Sprague and Clarence Innis, Attorneys for Puget Sound Power & Light Company.

Original filed July 1, 1932.

H. W. Carroll, City Comptroller and ex Officio City Clerk.

Comptroller's File No. 3

[fol. 35] *Duly sworn to by Frank McLaughlin. Jurat omitted in printing.*

Copy of within Received Sep. 19, 1932.

A. C. Van Soelen, Corporation Counsel.

[File endorsement omitted.]

[fol. 36] In Superior Court of King County

[Title omitted]

Motion to Strike from Amended Complaint—Filed Sept. 28, 1932.

Comes now the defendant above named and moves that the allegations and matters appearing in the amended complaint herein and hereinafter mentioned, be stricken, for the reason that the same are irrelevant and/or redundant:

I

All of the allegations and matters contained in paragraph VI of the first cause of action alleged in said amended complaint.

II

From Paragraph XV of the first cause of action alleged in said amended complaint the following allegations and matters: "and upon information and belief, based upon the form in which said ordinance was enacted as hereinbefore alleged and the failure of defendant to pay said license fee or tax, plaintiff alleges that defendant does not intend to pay and will not pay said license fee or tax or any part thereof".

III

All of the allegations and matters appearing in Paragraph XVI of the first cause of action alleged in said amended complaint.

[fol. 37]

IV

All of the allegations and matters appearing in Paragraph XX of the first cause of action alleged in said amended complaint.

V

All of the allegations and matters contained in Subparagraph (14) of Paragraph XXI of the first cause of action alleged in said amended complaint.

VI

From Paragraph I of the second cause of action alleged in said amended complaint all of the allegations and matters hereinabove mentioned.

A. C. Vansoelen, Corporation Counsel; Walter L. Baumgarten, Assistant, Attorneys for Defendant.

Received Sep. 28, 1932.

Todd, Holman & Sprague.

[File endorsement omitted.]

[fol. 38] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

ORDER ON DEFENDANT'S MOTION TO STRIKE FROM AMENDED COMPLAINT—Filed Oct. 5, 1932

This cause came on for hearing before the Honorable J. T. Ronald, one of the judges of the above entitled court, on the 30th day of September 1932, on motion of defendant to strike allegations appearing in plaintiff's amended complaint, plaintiff appearing at said hearing by Todd, Holman & Sprague and Clarence Innis, its attorneys, and defendant appearing by A. C. Van Soelen, corporation counsel, and Walter L. Baumgartner, assistant, and said motion was duly argued before the court by said counsel and the court being now duly advised therein.

It is hereby ordered that defendant's motion to strike the allegations and matters contained in Paragraph VI of plaintiff's first cause of action be and the same is hereby denied;

That defendant's motion to strike from Paragraph XV of plaintiff's first cause of action the allegation "and upon information and belief based upon the form in which said ordinance was enacted as hereinbefore alleged and the failure of defendant to pay said license fee or tax, plaintiff alleges that defendant does not intend to pay and will not pay said license fee or tax or any part thereof", be and the same is hereby denied;

[fol. 39] That defendant's motion to strike all the allegations appearing in Paragraph XX of plaintiff's first cause of action alleged in said amended complaint be and the same is hereby denied;

That defendant's motion to strike all allegations contained in sub-paragraph (14) of Paragraph XXI of plaintiff's first cause of action alleged in its amended complaint be and the same is hereby denied;

That defendant's motion to strike from Paragraph I of the second cause of action alleged in said amended complaint all of the allegations and matters hereinabove mentioned be and the same is hereby denied;

To all of which rulings denying defendant's motions to strike defendant excepts and its exceptions are hereby allowed.

That defendant's motion to strike all of the allegations and matters appearing in Paragraph XVI of the first cause of action alleged in plaintiff's amended complaint be and the same is hereby granted, to which order of the court plaintiff excepts and its exception is hereby allowed.

Done in open court this 5 day of October 1932.

J. T. Ronald, Judge.

Presented by Clarence Ennis.

[File endorsement omitted.]

[fol. 40] In Superior Court of King County

[Title omitted]

Demurrer to Amended Complaint—Filed Sept. 28, 1932

Comes now the above named defendant and demurs to the amended complaint in the above entitled action, for the reason that the same fails to state facts sufficient to constitute a cause of action, either at law or in equity.

A. C. Van Soelen, Corporation Counsel; Walter L. Baumgartner, Assistant, Attorneys for Defendant.

Received Sep. 28, 1932.

Todd, Holman & Sprague.

[File endorsement omitted.]

[fol. 41] In Superior Court of King County

[Title omitted]

Order Sustaining Demurrer to Amended Complaint and Denying Plaintiff's Motion for a Temporary Injunction—Filed Oct. 5, 1932

This cause came on for hearing before the Honorable J. T. Ronald, one of the judges of the above entitled court,

on the 30th day of September 1932, upon plaintiff's motion for a temporary injunction restraining defendant from the enforcement of Ordinance No. 62662 and/or No. 62662 as amended or any portion thereof, against plaintiff pendente lite, as prayed in plaintiff's amended complaint, and upon defendant's demurrer to said amended complaint, the plaintiff having appeared in court by its counsel, Todd, Holman & Sprague and Clarence Innis, and the defendant having appearing in court by its counsel, A. C. Van Soelen, corporation counsel, and Walter L. Baumgartner, assistant and the court having heard the arguments of counsel and being duly advised in the premises, announced that plaintiff would be granted a temporary injunction restraining defendant from the enforcement of said ordinance or any portion thereof against plaintiff pending the final determination of this litigation in the Supreme Court of the State of Washington, and that defendant's demurrer to said amended complaint would be sustained; whereupon, to [fol. 42] avoid the issues of said temporary injunction by the court, the said attorneys for defendant agreed to enter into a written stipulation, which is now on file herein, whereby subject to the terms of said written stipulation, defendant agreed to refrain from enforcing, or attempting to enforce the provisions of said ordinance against plaintiff pending the final determination of an appeal herein to the Supreme Court of the State of Washington.

Whereupon, by reason of the said stipulation of attorneys, for defendant, upon the validity of which and upon the good faith of defendant in making same, the court relies, plaintiff's motion for a temporary injunction is hereby denied to which plaintiff excepts and its exception is hereby allowed; and

It is hereby further ordered that defendant's demurrer to plaintiff's amended complaint be and the same is hereby sustained, to which ruling of the court plaintiff excepts and said exception is hereby allowed.

Done in open Court this 5 day of October, 1932.

J. T. Ronald, Judge.

Presented by: Clarence Innis.

[File endorsement omitted.]

[fol. 43] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

STIPULATION AS TO ENFORCEMENT PENDING FINAL DETERMINATION. Filed Oct. 5, 1932

It is hereby stipulated and agreed by and between the parties above named, by their respective counsel, under signed as follows:

Plaintiff agrees that it will immediately give notice of appeal to the Supreme Court of the State of Washington from an order to be entered herein dismissing plaintiff's amended complaint, and that it will diligently prosecute said appeal to the end that the same may be set for hearing by said court not later than the January 1933, term.

Defendant agrees that pending the final determination of said appeal by the Supreme Court of the State of Washington it will not enforce or attempt to enforce the provisions of Ordinance No. 62662 and/or Ordinance No. 62663 as amended, against the plaintiff.

This stipulation is entered into without prejudice to any right defendant may have to enforce said ordinance or ordinances against said plaintiff immediately upon the determination of the appeal by said court.

Both parties agree to use all diligence in the prosecution of such appeal.

Puget Sound Power & Light Company, a Corpo
[fol. 44] ration, by Todd, Holman & Sprague and Clarence Innis, Its Counsel. The City of Seattle, a Municipal Corporation, by A. C. Van Soelen, Corporation Counsel; Walter L. Baumgartner, Assistant, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 45] IN SUPERIOR COURT OF KING COUNTY

No. 255140

PUGET SOUND POWER & LIGHT COMPANY, a Corporation,
Plaintiff,

v.

THE CITY OF SEATTLE, a Municipal Corporation,
Defendant

JUDGMENT AND DECREE OF DISMISSAL—Filed Oct. 5, 1932

This cause came on for hearing before the Honorable J. T. Ronald, one of the Judges of the above entitled court, on this 5th day of October 1932, plaintiff appearing by Todd, Holman & Sprague and Clarence Innis, its attorneys, and defendant appearing by A. C. Van Soelen, corporation counsel, and Walter L. Baumgartner, assistant; and the court having entered an order on this date sustaining the demurrer of the defendant to plaintiff's amended complaint herein, to which order plaintiff duly excepted; thereupon said plaintiff by its said counsel gave notice in open court that it elects to stand upon the said amended complaint and declines to plead further;

Wherefore, by reason of the law and the premises, it is by the court considered, ordered and decreed that plaintiff's first cause of action and plaintiff's second cause of action, and each of them, be and each is hereby dismissed and that defendant go hence without day, and that defendant recover of plaintiff its costs and disbursements herein.

At the time of the signing of this judgment plaintiff duly excepted to the same and said exception is hereby allowed.

[fol. 46] Done in open court this 5 day of October 1932.

J. T. Ronald, Judge.

ORDER ALLOWING APPEAL

At the time the above and foregoing judgment and decree are entered and made the above named plaintiff in said cause by its said attorneys give notice in open court that it appeals from said judgment and decree and from each and every ruling of the court adverse to plaintiff, to the

Supreme Court of the State of Washington, and said appeal is hereby allowed, and the clerk of this court is directed to make an entry of said notice of appeal in the journal of the court.

Done in open Court this 5 day of October 1932.

J. T. Ronald, Judge.

Presented by Clarence Innis.

Judgment Number 118442. Entered in Execution Docket, Vol. 109, page 263.

[File endorsement omitted.]

[fol. 47] IN SUPREME COURT OF WASHINGTON

En Banc

No. 24296

PUGET SOUND POWER & LIGHT COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, Respondent

OPINION—Filed Apr. 21, 1933

This is a companion case to Pacific Telephone & Telegraph Co. v. City of Seattle, — Wash. Dec. —; and, like that case, is here on appeal by plaintiff from a judgment of dismissal after a demurrer to the amended complaint had been sustained. The assignments of error are:

"I. The court erred in sustaining respondent's demurrer to appellant's amended complaint.

"II. The court erred in dismissing appellant's first cause of action.

"III. The court erred in dismissing appellant's second cause of action.

"IV. The court erred in failing to hold that the enforcement of the ordinance as to appellant would contravene

article I, § 10, and the Fifth and Fourteenth Amendments to the Constitution of the United States, and article I, §§ 3, 14 and 16, and §§ 5 and 9 of article VII of the Constitution of the State of Washington."

The following provisions of ordinance No. 62,662, in addition to those set out in the opinion in the Telephone Co. case, are pertinent to the questions raised by the appellant in this case:

"Section 5. • • •

"(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent (3%) of the total gross income from such business in the city during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year."

"Section 6. City of Seattle, Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the city of Seattle, except that said city shall not as a taxpayer, be required to conform to the other provisions of this ordinance."

[fol. 48] The appellant raises some twenty-seven objections to the ordinance, all of which were disposed of in the Telephone Co. case, with the exception of two. These are: (1) That the tax is in contravention of appellant's rights under its franchise from the city; and (2) that the tax is peculiarly discriminatory, unreasonable and confiscatory, as to it, by reason of the fact that the city, in its proprietary capacity, is a competitor of appellant in the power and light business.

I. The Fourteenth Amendment of the state constitution provides: "The power of taxation shall never be suspended, surrendered or contracted away." This, however, does not answer appellant's first contention, since its franchise antedates the amendment. Whether or not the State or a municipality may barter away its taxing power is a question upon which the authorities generally are not in harmony. There are strong reasons why it should be held that it may not. State v. Hannibal & St. Joseph R. R. Co., 75 Mo. 208; City of Portland v. Portland Ry., Light &

Power Co., 156 Pac. 1058. For the purposes of this case, however, we do not find it necessary to pass upon that question, for, in any event, the intent to relinquish the power to tax must not only be clear but distinctly expressed. It is a doctrine that is indulged in no implications. The question is put and the rule concisely stated in City of St. Louis v. United Railways Co., 210 U. S. 266, as follows:

"The theory, then, upon which the bill was framed and this case decided was that the city, having once fixed a price for the use of its streets, which the railway companies had agreed to pay, there was no right to impose a license tax upon the railway companies under the ordinance. * * *

"The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a State or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that such deprivation can only follow when the State or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption."

No terms of appellant's franchise have been called to our attention which could be interpreted as a relinquishment by the city of any of its powers of taxation.

[fol. 49] II. In principle, appellant's second proposition is akin to the first. The question is: Can the State's power of taxation be abridged or abrogated by estoppel? In the abstract, the question would seem to merit scant consideration; but the allegations of the amended complaint reveal a condition of unfair competition, created by the exaction of this tax from the appellant, which commands the careful attention of a court of equity.

The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind, the city council, by virtue of § 6 of the ordinance, has undertaken to

subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom.

Conceding, for the sake of argument, that to be the situation, counsel for the city seek to sustain the tax against [fol. 50] appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification of persons and occupations subject to the tax; and that a privately owned light and power business is subject to a different classification than one owned by a municipality—that the one may properly be subjected to the excise and the other exempted.

In passing, it is to be noted that the ordinance is a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. Some half dozen businesses enjoying peculiar privileges in and upon the streets of the city are included within its purview. The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance.

The expediency of imposing excise taxes and the classification of persons and occupations affected is a legislative problem, so long as the exaction is not inherently oppressive and the classification is reasonable. As we have seen, in the case of Pacific Tel. & Tel. Co. v. City of Seattle, — Wash. Dec. —, the tax imposed by this ordinance is not inherently oppressive. The question here is whether the classification as between the appellant and the city, in its

ownership in a proprietary capacity of a light and power business, is reasonable. In the case of State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, Mr. Justice Roberts said:

"The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; Southwestern Oil Co. v. Texas, 217 U. S. 114; Brown-Forman Co. v. Kentucky, 217 U. S. 563. The fact that a statute discriminates [fol. 51] in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & Lewis Co., 240 U. S. 342; Quong Wing v. Kirkendall, 223 U. S. 59. As was said in Brown-Forman Co. v. Kentucky, supra, at p. 573:

"'A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

In the case of South Carolina Power Co. v. South Carolina Tax Commission, 52 Fed. (2d) 515, a statutory three judge court applied this rule to the identical problem with

which we are here confronted. An act of the legislature, imposing an excise on persons and companies generating electricity by hydroelectric and steam power, was under consideration. The act contained the following proviso:

"Provided, further, That the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers."

In answer to the contention that this was an unreasonable classification, Mr. Justice Parker, speaking for the court, said:

"So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228, 36 L. R. A.-(N. S.) 363. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the Fourteenth Amendment. See Village of Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note."

Appellant, in support of its position, cites three cases: Texas Electric Service Co. v. City of Seymour, 54 Fed. (2d) 97; Great Northern Utilities Co. v. Public Service [fol. 52] Commission, 52 Fed. (2) 802; Los Angeles Gas & Electric Co. v. City of Los Angeles, 241 Fed. 912 (affirmed 251 U. S. 32). In none of these cases was the taxing power involved. In each it is held that the municipality could not, under the guise of an exercise of its police power, impose an oppressive regulation upon a competitor in a business in which the municipality itself was engaged. These cases do not go to the extent of holding that estoppel can be invoked against the State or a municipality in the legitimate and necessary exercise even of the police power.

The applicability of the doctrine of estoppel to the exercise of the police power has been effectively denied in a number of cases. New Orleans Gas Light Co. v. Drainage Commission of New Orleans, 197 U. S. 453; New York and N. E. Railroad Co. v. Bristol, 151 U. S. 556; Butchers' Union etc. Co. v. Crescent City etc. Co., 111 U. S. 746;

Stone v. Mississippi, 101 U. S. 814; Beer Co. v. Massachusetts, 97 U. S. 25. In the latter case it is said:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. * * *

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi subprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In New York & N. E. Railroad Co. v. Bristol, supra, the rule is stated as follows:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal [fol. 53] protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

If this be true of the police power, the exercise of which depends upon the existence of government, it must be equally true of the taxing power upon which the very existence of government depends. The doctrine of estoppel, applied to the power of taxation, is inconsistent with any conception of government, for, carried to the ultimate, it

would result in the destruction of the State. South Carolina v. United States, 199 U. S. 437. See, also, Everett v. Adamson, 106 Wash. 355, 180 Pac. 144.

The judgment is affirmed.

Blake, J.

We concur:

Beals, C. J. Holcomb, J. Millard, J. Mitchell, J. Main, J.

Tolman, J., took no part.

[fol. 54] IN SUPREME COURT OF WASHINGTON

No. 24296

DISSENTING OPINION

STEINERT, J., dissenting:

As stated in the majority opinion, this is a companion case to Pacific Telephone & Telegraph Co. v. City of Seattle, — Wash. Dec. —, — P. (2d) —. All but two of this appellant's objections to the ordinance in question were disposed of in that case. My dissent in that case applies with equal force here. Since the majority opinion discusses and disposes of the two additional questions, my dissent is likewise extended, inasmuch as I disagree with the majority upon both questions.

The first question deals with appellant's rights under its existing franchise. The appellant here already had a complete and unqualified operating franchise from the city to engage in and carry on the business of selling and furnishing electric light and power for hire in the city of Seattle until March 14, 1952. By virtue of that franchise it had the express right to construct, maintain and operate its equipment and apparatus and to erect poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets and public places of the city. The grant was subject to repeal, change or modification for failure to operate in accordance with the provisions of the ordinance, or at all. Relying upon that franchise, the appellant made large investments of money installing its plant and equipment and building up its

service. It is now under the burden and duty of continuous operation. Its property is devoted to a public use. It can not cease its operations, nor has the city power to authorize it to cease doing business. A fortiori the city can not alter or amend the contract to the detriment of the grantee by the imposition of additional burdens. Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650; Hot [fol. 55] Springs Electric Light Co. v. City of Hot Springs, 70 Ark. 300, 67 S. W. 761; Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32, 64 L. Ed. 121; McQuillin, Municipal Corporations, Vol. 2, § 806.

In the Everett case, after stating that the municipality may, as a condition precedent to the use of its property, exact of the user such terms and conditions as it may deem necessary to impose, we said on p. 269:

"But it does not follow that the city may grant a franchise to a corporation to use its streets and other public places upon terms mutually agreed upon, and then afterwards during the life of the franchise annex additional burdens thereto without the consent of the grantee inconsistent with the rights granted. While it may not surrender the right of regulation necessary to the public health and safety, or the general taxing power (Const., art. 7, § 4), it can make a valid and binding contract concerning the terms upon which the grantee may make use of public places; such a contract as cannot be changed or altered at the will of the city without the consent of the other party thereto."

The crowning reason, in my opinion, for holding the ordinance inoperative and void as to this appellant is that it constitutes an unlawful exercise by the city of a governmental power in aid of its proprietary business. The city is a competitor of the appellant. Both are engaged in a similar business for profit. The appellant's franchise is not exclusive, hence it can not complain of competition. It may not even complain if the city should see fit to appropriate its property for public use by condemnation. But so long as appellant is permitted to function as a competitor, its property may not be taken from it without due process of law, and that, in effect, is just what the ordinance does. The validity of the tax must be determined by its true operation and effect on the basis of the results

which follow its operation. Aberdeen Savings & Loan Ass'n v. Chase, 157 Wash. 351, 289 Pac. 536; Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. Ed. 400.

In practical operation, the appellant must not only meet the competitive rates established by the city, but it must also comply with the regulations made by the Department of Public Works regarding its rates. The city is under no [fol. 56] such regulation, but has exclusive control of its own rates. If the appellant had no competition, it might secure from the state department the right to pass on to its customers the amount of the tax, upon a showing that its rate of return was insufficient to enable it to pay such tax. That attempt, however, would be futile so long as the city maintained a lower standard of rates. By the ordinance the city has the right of inspection of appellant's books of account. If the power to enforce such a tax as prescribed by the ordinance be granted to the city, then the amount thereof can be fixed as the city pleases, and at such a figure as it may determine from appellant's own books will result in the elimination of appellant as a competitor. Contrary to the view of the majority, I think that the following cases are applicable and controlling here, both as authority and in reason: Texas Electric Service Co. v. City of Seymour, 54 Fed. (2d) 97; Great Northern Utilities Co. v. Public Service Commission, 52 Fed. (2d) 802; Los Angeles Gas & Electric Co. v. City of Los Angeles, 241 Fed. 912 (affirmed in 251 U. S. 32). In the case last cited, the District Judge, on p. 921, said:

"I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

If this ordinance be upheld, it will result in appellant being required to pay to the city approximately one hundred and twenty thousand dollars a year out of its gross earnings for the privilege of transacting business; while

the city, even under the majority opinion, is entirely relieved of that handicap. It would therefore profit directly at the expense of its competitor. The city having entered into a field of competition in its proprietary capacity, enters it under the law of the survival of the fittest, and [fol. 57] may not, therefore, draw sustenance from its competitor through an assumption of public and governmental functions, to the strangulation of the one with whom it voluntarily competes.

I therefore dissent.

Steinert, J.

[fol. 58] IN SUPREME COURT OF WASHINGTON

En Banc

No. 24327

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle, Respondents

OPINION—Filed Apr. 21, 1933

The plaintiff brought this action to enjoin the defendant from collecting a license tax under ordinance No. 62,662, being entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties."

A demurrer interposed to the amended complaint was sustained. The plaintiff, electing to stand on the pleading, appeals from a judgment dismissing the action and assigns error as follows:

"I. The court erred in sustaining respondents' demurrer to appellant's amended complaint.

"II. The court erred in dismissing appellant's cause of action.

"III. The court erred in failing to hold that the enforcement of the ordinance as to appellant would contravene the Fourteenth Amendment to the Constitution of the United States, and article I, § 3, and article VIII, § 9, of the constitution of the state of Washington."

The pertinent provisions of the ordinance are:

"Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue."

"Section 2. * * * Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real proprty or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on [fol. 59] account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

"Section 5. Occupations Subject to Tax—Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income as follows:

"(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the city during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year."

The appellant sets up some twenty-one separate grounds or reasons why the tax sought to be collected from it under the ordinance is invalid. For the purposes of this discus-

sion, these may be classified into five groups: (1) That the city has no power to levy such a tax; (2) that the state has preempted this field of taxation; (3) that the definition of "Gross Income" is so indefinite and uncertain that neither the income subject to the tax nor the amount thereof can be ascertained; (4) that the tax is unreasonable, oppressive and confiscatory; and (5) that the tax is in contravention of appellant's rights under the Act of Congress of July 24, 1866, known as the Post Roads Act.

I. It is first contended that there is no grant of power from the state to the city to levy such a tax. The power, under which the right to levy the tax is asserted, is found in Rem. Comp. Stat., §§ 8966 and 8981.

Section 8966 relates to the powers of cities of the first class, and, among other things, provides:

"Any such city shall have power—

* * * * * * *

"33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same; Provided, that no license shall be granted to continue for longer than one year from the date thereof; * * *"

Section 8981 provides:

[fol. 60] "Any city adopting a charter under the provisions of this act shall have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not."

This court has held in numerous cases that cities and towns, under the powers granted, have the right to impose license taxes either for the purpose of regulation or revenue. Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 45, 299 Pac. 632.

Speaking of the grant of power contained in subdivision 33, § 8966, supra, in the Fleetwood case, Judge Dunbar said:

"This provision is in relation to cities of the first class. * * * The language is comprehensive. The authority is to grant licenses for any lawful purpose, and, in the absence of restriction, the purpose of raising revenue is as lawful as the purpose of exercising the police power. This interpretation is borne out, we think, by the authorization of the legislature to cities of other classes. * * * And so the power to license for purposes of revenue is especially granted to all the other classes of cities."

We think that, by virtue of § 8981, supra, the power to license for purposes of revenue is also "especially granted" to cities of the first class. In any event, subdivision 33 of § 8966 has been uniformly construed to confer such power. Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650.

II. It is contended that, conceding the power, the city is precluded from exercising it, because the state has preempted this field of taxation. With respect to police powers, it is a rule of universal application that a municipality may not enact regulatory ordinances upon subjects covered by state legislation. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Whether this rule is applicable in cases involving the exercise of the taxing [fol. 61] power, it is not necessary for us to determine, because the state had not entered this field of taxation at the time the ordinance in question was enacted.

It must be kept in mind that the power granted to the city to issue licenses is dual: (1) for regulation; (2) for revenue. The power here exercised is for revenue and not for regulation. Here the granting of the license is an incident to the power to raise revenues. The license is the means, not the end. It is the method provided for raising the revenues. The penalty provided is merely a mode of enforcing payment, and the license is only a receipt for the tax. Home Insurance Co. v. City Council, 93 U. S. 116. The tax is an excise. It is levied upon the right to do business, not upon the right to exist; nor upon the property. The cases relied upon by appellant on this point

so characterize such a tax. State ex rel. Zielonka v. Carrel, 124 N. E. 134; Cincinnati v. American Telephone & Telegraph Co., 147 N. E. 806; Firestone v. Cambridge, 148 N. E. 471.

In I Cooley on Taxation (4th ed.), § 26, it is said:

"One distinction between a tax upon a business * * * and a license is said to be that the former is exacted by reason of the fact that the business is carried on * * * within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business * * * within the jurisdiction.' So it has been said that a charge cannot be deemed a license rather than a tax unless the payment thereof confers some right or privilege upon the person charged which otherwise would not exist."

A license is granted under the police power; an excise is imposed under the taxing power. The former is essentially not a tax at all. I Cooley, Taxation (4th ed.), § 26.

"The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, although the purpose is essentially different. The one is made for regulation and the other for revenue. If for regulation, it is an exercise of the police power while if for revenue it is an exercise of the taxing power." I Cooley, Taxation (4th ed.), § 27.

[fol. 62] Bearing this distinction in mind, we shall examine briefly the statutes, by virtue of which appellant contends that the state has preempted the field of taxation covered by the ordinance,

Laws of 1929, chapter 107, requires public utility companies, subject to regulation as to rates and charges by the department of public works, to "pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue. * * *" This act is amendatory of § 1 of chapter 107 of the Laws of 1923, which in turn was amendatory of §§ 1 and 3 of chapter 113 of the Laws of 1921. The earlier laws fixed flat rates, determined by gross earnings, ranging from five dollars to $1,500.

Laws of 1921, chapter 113, § 1, refers to persons and corporations required to file statements with the director of

public works under § 78, chapter 117, Laws of 1911, and requires them to pay "a fee" in accordance with a fixed schedule. Section 2, chapter 113, Laws of 1921, then provides:

"All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer, and by him deposited in a *fund to be known as the public service revolving fund.*"

Chapter 117, Laws of 1911, is the public service commission law, and is purely a regulatory act. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Obviously, chapter 107, Laws of 1929, chapter 107, Laws of 1923, and chapter 113, Laws of 1921, are adjuncts to this act. It is equally obvious, from the words which we have italicized in § 2 of the latter act, that the fund created was solely for the purpose of defraying the expense attendant to the adminstration of the public service commission law. We think it is clear, from the entire context of the act of 1921, that the purpose of it was regulatory. The raising of the rates in the act of 1923 and the changing of the method [fol. 63] of computation of the fee to be paid in the act of 1929 have not changed its character.

It is further contended that by chapter 227, Laws of 1929, the state has preempted this field of taxation. That act is entitled, "An Act relating to fees of foreign and domestic corporations * * *," and the tax exacted has been held to be a license fee to which corporations are subjected for the privilege of doing business in this state in a corporate capacty—as a corporate entity. In Spokane International Ry. Co. v. State, 162 Wash. 395, 299 Pac. 362, construing this act, it is said:

"The tax is upon the privilege the state grants to the corporation to engage in commerce with the advantages derived from a corporate organization, not upon the commerce itself."

III. That "Gross Income" is a proper basis for determining the amount of the tax to be paid, is well established by the authorities. I Cooley, Taxation (4th ed.), § 42; State v. Minnesota & International R. Co., 118 N. W. 679; State v. Central Trust Co., 67 Atl. 267; People ex rel. Westchester

Lighting Co. v. Gaus, 92 N. E. 230; State v. United Electric Light & Water Co., 97 Atl. 857; Nebraska Telephone Co. v. Lincoln, 117 N. W. 284. The definition of "Gross Income," contained in the ordinance, is substantially the same as that contained in the act of West Virginia, considered in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. The tax challenged in that case was sustained. It would be practically impossible to define "Gross Income" so that more or less pertinent objections could not be aimed at the definition. We are satisfied, however, that the objections raised by appellant are more fancied than real; and that, in practical application, under present day systems of accounting, appellant will have no serious difficulty in ascertaining the amount of tax it is required to pay. The task of segregating revenues derived without the city from those derived within, affords no legal [fol. 64] objection to the tax. Western Union Tel. Co. v. Fremont, 58 N. W. 415; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692.

IV. It is next contended that the tax is unreasonable, oppressive and confiscatory. "The power to tax carries with it the power to destroy," has been so frequently stated that it has become axiomatic. Yet, practically, the power to tax is limited to what is reasonable. Oppressive or confiscatory taxes ordinarily will not be sustained. But whether a tax is reasonable is primarily a legislative problem, and the courts will not hold a tax invalid on the ground that it is oppressive or confiscatory unless there is clear abuse of the power conferred. It is said in IV Cooley, Taxation (4th ed.), § 1714:

"Where an excise tax is imposed for revenue, as distinguished from a fee imposed merely for regulation, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue does not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose, where the business or occupation is a useful and lawful one, although there is some authority apparently to the contrary which would preclude a court from considering the amount of the tax in any case.

So far as the right to engage in a business of a harmless and useful character is concerned, 'the state may not impose an occupation tax which shall operate as a prohibition or as a burden of magnitude sufficient to render the right valueless.' But a tax for revenue possibly may be made so large as to be prohibitive, where the occupation may be prohibited, although in such a case the fee ordinarily is deemed an exercise of the police power rather than of the taxing power."

This rule has been stated by this court. Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188.

In Nebraska Telephone Co. v. Lincoln, 117 N. W. 284, a levy of two per cent of gross earnings was upheld. A tax of five per cent was sustained in Lincoln Traction Co. v. Lincoln, 121 N. W. 435. In City of St. Louis v. United Rys. Co., 174 S. W. 78, a tax was levied, and upheld, on each car used for transporting passengers, at the rate of one mill [fol. 65] for every passenger carried. A tax of two per cent on gross receipts was upheld in Southwestern Oil Co. v. State of Texas, 217 U. S. 114. In that case, quoting from Delaware Railroad Tax Cases, 18 Wall. 206, the court said:

"* * * 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' "

We do not think the rate fixed by the ordinance is unreasonable, oppressive or confiscatory.

V. Appellant next contends that, under the act of Congress of July 24, 1866 (14 Statutes L. 221), it has the right to occupy the streets without the city's consent. Conceding this right, it does not impair the city's power to levy taxes on the beneficiaries of the act. In Williams v. Talladega, 226 U. S. 404, it is said:

"These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privi-

leges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State."

The demurrer to the amended complaint was property sustained, and the judgment is affirmed.

Blake, J. Main, J.

We concur:

Beals, C. J. Holcomb, J. Millard, J. Mitchell, J.

Tolman, J., took no part.

[fol. 66] IN SUPREME COURT OF WASHINGTON

No. 24327

DISSENTING OPINION

STEINERT, J., dissenting:

I cannot agree with either the reasoning or the result of the majority opinion. It is to be borne in mind that the case is before us on the amended complaint, a demurrer thereto which was sustained, and a judgment dismissing the action.

The amended complaint is too long to be set forth in its entirety; a brief summary of it must suffice. Its allegations may be reduced to the following statement: Appellant is a California corporation and as such has complied with the laws of this state relating to foreign corporations. It owns and operates a telephone and telegraph system and does both an intrastate and interstate business. For the sake of convenience and adequate service to its patrons, it has divided the state of Washington into a number of exchange areas. The "Seattle exchange area" includes several thousand telephones outside the limits of the city of Seattle. Service between telephones within the same exchange area is designated "telephone exchange service"; the service between telephones located in different exchange areas is designated "telephone toll service". The company's ac-

counts are kept in accordance with forms prescribed by the Interstate Commerce Commission and the Department of Public Works of Washington. The company has a central office equipment in Seattle having a value in excess of ten million dollars. Through its central office is rendered not only exchange service within the Seattle exchange, but also toll service, both intra-state and interstate. The company also has central office equipments in the other exchange areas throughout the state, aggregating in value about twenty million dollars. The company's business in the city of Seattle, according to the amended complaint, has at all times been conducted in an efficient and economical [fol. 67] manner. Its net earnings derived from its business in the Seattle exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of its property used and useful in furnishing service within the exchange, were not in excess of 3.25%; its net earnings from business wholly within the city's limits were somewhat less. Subsequent to the first three months of 1932, the net earnings declined, and conditions existing at the time that the action was commenced indicate a probable further decline. The company has paid all its taxes for the years prior to 1931. In 1932 it paid taxes, for 1931, on its real estate inside the city, in the sum of $96,908.41, of which the city received $44,164.01 as its proportion. The company also paid $302,390.97 as the first half of 1931 personal property taxes, of which the city received $126,664.52. The remaining half became payable after this action had been commenced.

It is alleged in the amended complaint that the company was licensed by the state of Washington to engage in the telephone and telegraph business in and throughout the state, including the city of Seattle, for which license it paid the state, in 1932, a fee of $12,777.11; that the duty to give telephone service in Seattle and elsewhere in the state is a continuous one and cannot be terminated except with the consent of the state; and that for more than twenty-one months last past the company has not earned a fair return upon its property, and that the tax is arbitrary, unreasonable and confiscatory. The demurrer, of course, admits these allegations.

My first reason for dissent is that under the allegations of the amended complaint a prima facie case is stated. Not

only is it directly alleged that the license fee is arbitrary, unreasonable and confiscatory, but sufficient facts to support the allegation, if it be considered as a mere conclusion, are also stated. We can not disregard those facts or the issue tendered thereby. If the city can fix the rate at four [fol. 68] per cent, it can also fix it at ten. It is as easy to specify the one as it is the other. There is no innate virtue in the figure four, nor any inherent vice in the figure ten. We cannot say, nor are we privileged to say, dogmatically, that a fee of four per cent, as prescribed by the ordinance, is not unreasonable or confiscatory, or that a fee of ten per cent would be. It will require evidence, probably of an expert nature, to show what the actual situation is, and, until that evidence is produced, we cannot prejudge it. The demurrer should have been overruled for this reason alone, if for no other.

But I go further. The ordinance is not regulatory, but simply one for revenue. Not only does the ordinance declare it to be a revenue measure, but its very terms make no provision for regulation. This much is conceded in the majority opinion. The question then presents itself: Has the city the right to compel the company to obtain a license from it and to pay a tax or fee therefor before it can continue to carry on its business within the city?

Section 3 of the ordinance provides that after July 1, 1932, no person may engage in any business, occupation, pursuit or privilege for which a license fee or tax is imposed, without a license; that any taxpayer who carries on his business without such license shall be guilty of a violation of the ordinance for each day that the business is carried on or conducted. Section 24 provides that any person failing to comply with any of the provisions of the ordinance shall be guilty of a misdemeanor, punishable by a fine in any sum not to exceed three hundred dollars or by imprisonment in the city jail for a term not exceeding ninety days, or by both such fine and imprisonment.

If the city cannot compel the taking out of a license, then it cannot impose the tax. In the case before us the company had, under chapter 227, Laws of 1929, § 5, Rem. Rev. [fol. 69] Stat., § 3836-5, paid the state the sum of over twelve thousand dollars for the privilege of doing business in the state of Washington, for the year 1932. The privilege so obtained was comprehensive and subject to no

limitations. The city could not give the company something that it already had; nor, conversely, could it take away or withhold a right that the company then possessed. The sovereign having granted the right, the city could not withdraw it. Since it could not take it away, it cannot hamper its exercise in the manner attempted. Mayor and Aldermen of Savannah v. Georgia, 36 Ga. 460; Reser v. Umatilla County, 48 Ore. 326, 86 Pac. 595; Cooley on Taxation, 4th Ed., § 1691. A license is simply the authority to conduct a business or pursue a calling, or the right conferred by the municipality which makes the pursuit lawful and without which it would be unlawful. The appellant having been authorized by the state to conduct its business within the state, the city cannot make that pursuit unlawful.

The majority opinion cites the following cases in support of the rule that cities and towns may impose taxes either for revenue or regulation: Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652. Those cases do announce that rule, it is true, but neither they nor the rule therein announced are applicable here, for the reason that in none of those instances had the state previously granted the privilege. Consequently, the municipality there had the right to exact a license for the conduct of the business, and the payment of a tax therefor. If the parties did not care to engage in business on the terms exacted, they could either have refrained from entering upon it or else with-
[fol. 70] draw if they had already begun. The situation here is not at all comparable. The company cannot withdraw from the field but must continue to function; that was one of the considerations for which it was permitted to enter the state.

Approaching the matter from a somewhat different angle, I am of the view that the particular field of taxation had already been preempted by the state under chapter 113, Laws of 1921, Rem. Comp. Stat., § 10417, chapter 107, Laws of 1923, Rem. 1927 Sup., § 10417, both amended by chapter 107, Laws of 1929, Rem. Rev. Stat., §§ 10417-10419; and chapter 227, Laws of 1929, § 5, Rem. Rev. Stat., § 3836-5. The amending act of 1929 requires every public

utility to file with the Department of Public Works an annual statement showing its gross operating revenues for the preceding year, and to pay a fee of one tenth of one per cent thereon. All such fees are required to be deposited in the public service revolving fund. The act makes the failure to pay such fees a misdeameanor punishable by a fine for each day's failure to pay. The last act requires all foreign corporations doing intrastate business in this state to pay certain fees for the privilege of doing such business. Those acts are, in my opinion, purely license acts and not regulatory. The funds derived therefrom are not devoted to the purpose of regulation, but, with the exception of the annual fees paid to the secretary of state, are required to be paid into the public service revolving fund, which is a general fund of the state subject to reappropriation by the legislature. The right to appropriate funds, under Art. VIII, § 4, of the state Constitution, is recognized in State ex rel. Bloedel-Donovan Lumber Mills v. Clausen, 122 Wash. 531; 211 Pac. 281, and State ex rel. Shuff v. Clausen, 131 Wash. 119, 229 Pac. 5. The state having occupied the field of excise taxation, the city may not encroach upon it. We have here the same situation, in principle, as was presented in State ex rel. Webster v. Superior Court, 67 Wash. 37 120 Pac. 861, where [fol. 71] the right of the state was declared supreme and exclusive. The state having granted the privilege and having taxed it, the city could not thereafter exact an additional sum for the same privilege or right; otherwise, the municipality, by added exactions, could thwart the whole purpose of the state in admitting corporation to do a specific business therein on such terms as it saw fit to fix. The sovereign would be subsidiary to its various subdivisions. Cincinnati v. American Telephone & Telegraph Co., 112 Ohio St., 493, 147 N. E. 806; Firestone v. City of Cambridge, 113 Ohio St., 57, 148 N. E. 470; Cincinnati Oil Works v. City of Cincinnati, 123 Ohio St. 448, 177 N. E. 768.

Further, I think that the definition of "Gross Income", in the ordinance, is so vague and uncertain as to render the ordinance inoperative and void. By its provisions the ordinance is penal. Fine and imprisonment are the penalties for non-compliance. The taxpayer is entitled to know definitely and certainly the amount of tax which he

is required to pay and the method of its ascertainment, without the expense of litigation necessary to determine either. Western Union Telegraph Co. v. Texas, 87 Tex. 630; State ex rel. Crow, Attorney General v. West Side Street Ry. Co., 146 Mo. 155, 47 S. W. 959; Standard Oil Co. v. State, 178 Ala. 400, 59 So. 667; Winslett v. Case Fowler Lumber Co., 173 Ga. 539, 160 S. E. 384.

Looking at the terms of the ordinance, I do not see how the taxpayer could possibly determine the amount of tax to be paid by it, or the method of its ascertainment, without resort to litigation. Different and vitally conflicting views will arise out of the interpretation of its language. Section 2 of the ordinance reads as follows, with reference to the definition of income:

"Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other [fol. 72] emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

Does the word "value" as there used import "cost price", "sale price", or "net profit" on the sale of tangible property or service? If any one of these was intended, it could easily have been expressed. Again, the word "receipts" expressly excludes receipts or proceeds from the use or sale of real property. Appellant's equipment to the extent of millions of dollars is housed in, and in large part is permanently affixed to, buildings which are a part of the realty. Are the receipts from that source, pro tanto, to be deducted? Who shall say? How is anyone to know? It may confidently be assumed that the city will insist that no deductions are to be made in that respect. As confidently may it be assumed that the appellant will insist to the contrary. Many other questions are raised by the wording of this section, all of which lead to confusion in

the atempt to interpret them. The majority opinion says that the definition of "Gross Income" in the present ordinance is substantially the same as that contained in the act of West Virginia, considered and sustained in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. I do not so read it. That act provided that persons engaging in certain businesses should pay a tax "equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided) multiplied by the respective rates". The language is not only entirely different, but upon its very face it shows that the tax is to be computed on the gross sales of the products. No such certainty or definiteness appears here. The rule by which the tax is to be measured should be definite and certain, and its definiteness and certainty should appear from its provisions and not be the product of either litigation or [fol. 73] compromise.

For the reasons suggested, and rather briefly stated in the light of the extended discussion in the briefs, I dissent.

Steinert, J.

[fols. 74-87] Petition for rehearing, covering 14 pages, filed May 18, 1933, omitted from this print. It was denied and nothing more by order of June 14, 1933.

[fol. 88] In Supreme Court of Washington

[Title omitted]

Order Denying Rehearing—Filed June 14, 1933

The court having considered the appellant's petition for a rehearing herein,

It is ordered that the said petition be and it hereby is denied.

Dated this 14 day of June, 1933.

By the Court:

Walter B. Beals, Chief Justice.

[File endorsement omitted.]

[fol. 89] IN SUPREME COURT OF WASHINGTON

No. 24296

PUGET SOUND POWER & LIGHT COMPANY, Appellant,

vs.

THE CITY OF SEATTLE, Respondent

JUDGMENT—June 14, 1933

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 14th day of June, A. D. 1933, on motion of A. C. Van Soelen, C. V. Heard, W. L. Baumgartner, of counsel for respondent considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said The City of Seattle have and recover of and from the said Puget Sound Power & Light Co. and from New Amsterdam Casualty Co. surety the costs of this acton taxed and allowed at One Hundred & Twelve & 15/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 90] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed June 19, 1933

Your petitioner, the appellant above named, to-wit, Puget Sound Power & Light Company, a Massachusetts corporation, hereby respectfully sets forth that on the 14th day of June, 1933 the Supreme Court of the State of Washington sitting at Olympia, Washington, made and entered a

final decision in the above entitled cause affirming a judgment of the Superior Court for King County, Washington, in favor of appellee and against your petitioner; that the Supreme Court of the State of Washington is the highest court of the said State of Washington in which a decision in said matter can be had.

Considering itself aggrieved by the said final decision of the said Supreme Court of the State of Washington in the above entitled cause, the plaintiff therein, Puget Sound Power & Light Company, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and that said appeal shall operate as a supersedeas and shall suspend and stay the return of the remittitur in said cause from the Supreme Court of the State of Washington [fol. 91] to the Superior Court of the State of Washington for King County, and shall suspend and stay the enforcement of Ordinance No. 62662, of the City of Seattle, or any part thereof, against petitioner during the pendency of said appeal, and for an order fixing the amount of the bond thereon.

Assignment of Errors

The said Puget Sound Power & Light Company assigns the following errors in the record and proceedings in the said cause:

I

The Supreme Court of the State of Washington erred in holding that Ordinance No. 62,662 of the City of Seattle, under the facts of this case, does not deny to appellant the equal protection of the law and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, in that, in and by said ordinance, there is imposed upon appellant, for revenue purposes only, a license tax of 3% of appellant's gross revenues from its electric light and power business in the City of Seattle, and the same or a similar burden is not imposed upon appellant's competitor in said electric light and power business in said City of Seattle, namely, The City of Seattle, which is engaged in such business in a proprietary capacity (not governmental) and for profit.

II

The Supreme Court of the State of Washington erred in holding that even though appellee, the City of Seattle, in a proprietary capacity and for profit is engaged in direct and active competition with appellant in the light and power business in the City of Seattle, the City of Seattle may lawfully impose upon appellant a license tax solely [fol. 92] for revenue purposes in the amount of three per cent of appellant's gross revenue from its said light and power business, and may fail to impose a similar tax upon appellant's competitor in said business, the City of Seattle, and may exempt appellant's said competitor from such taxation; and in holding that for the purpose of such a tax imposed by the City of Seattle the said city may classify the corporations engaged in the electric light and power business in the city into two groups, namely, (1) municipally owned, and (2) privately owned, and may impose such an excise tax upon the privately owned corporation engaged in such business and may exempt from such tax or fail to impose the tax upon the municipally owned corporation which is engaged in the same identical business in a proprietary capacity and for profit. Such holdings of the Supreme Court of the State of Washington deny appellant equal protection of the law and deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of Washington erred in failing to hold that, under the facts of this case, the tax imposed upon appellant by Seattle Ordinance No. 62,662, constitutes an appropriation of appellant's property without compensation and will deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, even though the City of Seattle could and did by said ordinance impose upon itself the same tax which by said ordinance it asserts the right to impose upon appellant.

IV

The Supreme Court of the State of Washington erred [fol. 93] in refusing to hold that in its application to appellant under the conceded facts said ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United States because in its actual operation and effect the application thereof to appellant will constitute an oppressive and a confiscatory exercise of a governmental power of taxation by the City of Seattle in aid of its proprietary business, will enable the City of Seattle as witness, prosecutor, jury, judge and executioner (regardless of motive) to eliminate appellant as competitor of the City of Seattle and will result in a spoilation of appellant's business and property and an appropriation thereof by the City of Seattle without compensation.

V

The Supreme Court of the State of Washington erred in holding that said Ordinance No. 62,662, of the City of Seattle does not constitute an impairment of the franchise contract between appellant and the City of Seattle, in contravention of Article I, Section 10, of the Constitution of the United States.

VI

The Supreme Court of the State of Washington erred in refusing to hold that the ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United States in that the ordinance, and particularly the definition of "gross income" in Section 2, thereof, is vague, indefinite and uncertain.

Prayer for Reversal

For which errors appellant prays that the said judgment of the Supreme Court of the State of Washington dated [fols. 94-104] June 14, 1933, be reversed and a judgment and decree entered in favor of plaintiff as prayed in its amended complaint, and for costs.

Elmer E. Todd, Clarence R. Innis, Frank E. Holman, William M. Allen, Counsel for Appellant.

[fol. 105] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 19, 1933

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Washington on the 14th day of June, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided,

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the above entitled cause as provided by law, and that upon the execution of a bond in the total penalty of Twenty-five thousand Dollars ($25,000), One thousand dollars ($1,000) of which amount is security for costs on appeal, said appeal [fol. 106] shall operate as a supersedeas and shall suspend and stay the return of the remittitur herein from the Supreme Court of the State of Washington to the Superior Court of King County, Washington, and the enforcement of Ordinance No. 62,662 of the City of Seattle or any part thereof against appellant until the final determination of said appeal, and

It is further ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record, proceedings and judgment in this cause, in accordance with Rule 10 of the Revised Rules of the Supreme Court of the United States, and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within sixty (60) days of this date.

Dated this 19 day of June, 1933.

Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington.

[fols. 107 & 108] Supersedeas bond on appeal for $25,000, approved and filed June 19, 1933, omitted in printing.

[fols. 109-111] Citation, in usual form, showing service on A. C. Van Soelen et al., filed June 21, 1933, omitted in printing.

[fol. 112] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed June 21, 1933

To the Honorable C. S. Reinhart, Clerk of the Supreme Court of the State of Washington:

You will please make and transmit to the Supreme Court of the United States, under your hand and seal of the Supreme Court of Washington, in the manner and in the time required by the statutes of the United States, the rules of the Supreme Court of the United States and the Order allowing an appeal in the above entitled cause, a true copy of the material parts of the record in the above entitled cause, including therein the following documents and papers, to-wit:

1. Amended Complaint, including (a) Ordinance No. 62662 attached thereto as Exhibit "A", and (b) Protest attached thereto as Exhibit "B".
2. Defendant's motion to strike from Amended Complaint.
3. Order on defendant's motion to strike from Amended Complaint.
4. Demurrer of Defendant to Amended Complaint.
5. Order sustaining demurrer to Amended Complaint.
6. Stipulation filed October 5, 1932.
7. Judgment and Decree of Dismissal and Notice of Appeal to Supreme Court of Washington.
8. Opinion of Supreme Court of Washington filed April 21, 1933.

[fol. 113] 9. Opinion of Supreme Court of Washington in its Case No. 24,327, The Pacific Telephone and Telegraph Company, a corporation, Appellant, v. The City of Seattle, et al., Respondents.

10. Appellant's Petition for Rehearing.

11. Order denying Petition for Rehearing dated June 14, 1933.

12. Judgment entered June 14, 1933.

13. Petition for allowance of appeal, assignments of error and prayer for reversal.

14. Statement as to jurisdiction of the Supreme Court of the United States.

15. Order allowing appeal and fixing bond.

16. Bond.

17. Citation with proof of service.

18. Notice directing attention to Rule 12, United States Supreme Court Rules.

19. Acknowledgment of service of copies of petition for appeal, order allowing appeal, assignments of error, statement as to the jurisdiction, and notice directing attention to Rule 12, United States Supreme Court Rules.

20. Præcipe for record and proof of service.

Elmer E. Todd, Clarence R. Innis, Frank E. Holman, William M. Allen, Counsel for Appellant.

Service of the foregoing Præcipe and receipt of copy thereof acknowledged this 20 day of June, 1933.

A. C. Van Soelen, Walter L. Baumgartner, Charles V. Hoard, Counsel for Appellee.

[fol. 114] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 115] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 14, 1933.

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon and

represents that the whole of the record, as filed, is necessary for the consideration of the case.

Elmer E. Todd, Clarence R. Innis, Frank E. Holman, William M. Allen, Counsel for Appellant.

Service of the foregoing statement and designation acknowledged this 20 day of June, 1933.

A. C. Van Soelen, Walter L. Baumgartner, Charles V. Hoard, Counsel for Appellees.

[fol. 116] [File endorsement omitted.]

Endorsed on cover: File No. 37,947. Washington Supreme Court. Term No. 344. Puget Sound Power & Light Company, Appellant, vs. The City of Seattle. Filed August 14, 1933. File No. 344, O. T., 1933.